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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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Federal Communications Commission
Office of Secretary

In the Matter of

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Streamlining Broadcast EEO Rule and)
Policies, Vacating the EEO Forfeiture Policy) MM Docket No. 96-19
Statement and Amending Section 1.8 of the)
Commission's Rules to Include EEO Forfeiture)
Guidelines.)

To: The Commission

MOTION FOR ACCEPTANCE OF LATE-FILED COMMENTS

The South Dakota Broadcasters Association ("SDBA"), by the undersigned, hereby seeks the acceptance of the attached Comments in the above-captioned proceeding. The SDBA represents 21 television stations and 99 radio stations licensed to communities in the State of South Dakota. The SDBA believes that its participation in this proceeding will bring before the Commission issues unique to stations in small markets and low density population areas. The SDBA meeting at which the attached Comments were approved was held during the afternoon hours of July 11, 1996, the due date for the Comments and the Comments were not approved in time to be filed with the FCC in Washington by 5:00 p.m. EST. Inasmuch as this one day delay in filing of the Comments is unlikely to cause prejudice to any party and acceptance of the Comments of the SDBA will help assure that the Commission has a complete factual record

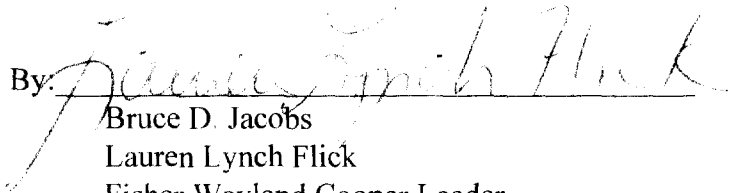
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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541
JUL 12 1996

before it in this proceeding, it is respectfully requested that the attached Comments be accepted.

Respectfully submitted.

SOUTH DAKOTA BROADCASTERS ASSOCIATION

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Dated: July 12, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C

In the Matter of

Streamlining Broadcast EEO Rule and Policies.)	
Vacating the EEO Forfeiture Policy Statement)	MM Docket No. 96-19
and Amending Section 1.8 of the Commission's)	
Rules to Include EEO Forfeiture Guidelines.)	

To: The Commission

COMMENTS OF THE SOUTH DAKOTA BROADCASTERS ASSOCIATION

The South Dakota Broadcasters Association ("SDBA"), by the undersigned, hereby submits the following comments in the above-captioned proceeding. In so doing, the SDBA notes that it is committed to the goal of assuring that equal employment opportunities are available to all. The SDBA is uniquely qualified, however, to speak to the special demands and burdens that the Commission's rules and policies, developed in pursuit of this same goal, inadvertently place on stations in small markets and low population density areas. In light of the unique burdens the current rules and policies place on these stations, the SDBA supports the Commission's efforts to streamline the EEO rule and policies, but encourages the Commission to reject one-size-fits-all recruitment practices, forfeiture guidelines and review standards which operate as quotas, despite the Commission's intent to the contrary, and which particularly fail to meet the specialized needs of these types of station.

1. The SDBA submits that the Commission's proposal to allow stations to use the alternative method of demonstrating EEO compliance through the use of an employment benchmark may be of benefit to some small stations, but it is not feasible to apply the benchmark to stations in the small markets and sparsely populated areas of South Dakota. Accordingly, the

SDBA submits that consideration of stations' EEO programs, where a benchmark approach is not used, must take into account the unique circumstances in which stations such as those described herein find themselves. If such a case-by-case consideration is not feasible for the FCC to implement or enforce, then the SDBA believes that rather than revert to one-size-fits-all regulation, the FCC should defer to the EEOC which is localized to each broadcaster's community and able to judge the broadcaster's performance in light of the circumstances of the station's location and minority population.

Background

2. The SDBA has as its members some 21 television stations and 99 radio stations licensed to communities in the State of South Dakota. These stations, faced with unique recruiting challenges inherent in their locales, believe that the current guidelines, as written and as carried out in practice, fail to take into account the individual situation in which each job applicant, each minority group, each station and each market finds itself. For this reason, the SDBA advocates rejecting policies which apply one-size-fits-all-style regulation to broadcast licensees. To do so, the Commission will have to change the burden of proof imposed on petitioners to deny and establish presumptions which favor the broadcaster.

3. The State of South Dakota covers an area of approximately 76,000 square miles.^{1/} If transported to the East Coast, South Dakota would engulf Washington, D.C. and half of the eastern seaboard states, including Maryland, Delaware, New Jersey, New York, Connecticut, Rhode Island and half of Massachusetts.^{2/} The population of this area in South Dakota, however, is only 700,000, or roughly equivalent to the population of Delaware, as compared to

^{1/} Rand McNally, Road Atlas (69th ed. 1993).

^{2/} Id.

approximately 39,190,000 if it were located on the East Coast.^{3/} South Dakota's largest city, Sioux Falls, hosts some 109,000 people while the East Coast's largest city, New York City, is the home to 7,333,000.^{4/} The ethnic make-up of the region is also completely dissimilar to more urban areas of the country. State-wide, the population is 91.6% non-minority and .5% African-American, 7.3% American Indian, Eskimo and Aleutian, .8% Hispanic, and .4% Asian.^{5/}

4. These statistics, however, tell only a part of the story of EEO implementation in the region in which the SDBA stations operate. To understand the whole employment picture in any area, one must consider the specific resources available for minority outreach in that area. The case of American Indians in South Dakota is illustrative. Although Native Americans are all grouped together in one EEO classification, this minority group is by no means homogenous. There are several different cultural groups, each with a separate cultural identity. These groups may be readily identifiable as separate tribes, such as the Sioux and the Northern Cheyenne, but just as often, these groups appear to the uninitiated to be united through the use of a common name, such as the Ogalala Sioux and the Cheyenne River Sioux, when in fact they are culturally very different. To recruit from among all these groups, a station must use a separate agency for each tribe. While the broadcaster also may use more generalized sources such as area newspapers, colleges, universities, communications schools, trade publications and internships, if these sources are unsuccessful, there are no other sources targeted to the area's Native American population to which the station can turn. Thus, that portion of the Commission's self-assessment requirement which directs these stations to discard sources which have not yet produced

^{3/} Id.

^{4/} 1996 County and City Extra (C. Slater & G. Hall eds. 1996).

^{5/} Id.

substantial referrals fails to account for the fact that, in some cases, no other more productive referral sources exist and that continued use of the same referrals may be the concerted, repetitive effort necessary to entice otherwise reluctant applicants to come forward.

5. It also must be noted, however, that it may not be fair to fault the sources a broadcaster has used when a minority applicant does not come forward. In some cases, cultural identity may play an important role in a minority's interest in working in some broadcast careers. For example, the pursuit of careers in journalism and news is not encouraged in some Native American cultures as demonstrated by the fact that an SDBA member's survey of the journalism program at South Dakota State University revealed that at the time, there were no Native Americans enrolled in the program. Moreover, the University had no incentive program to try to attract them to it. Here again, that portion of the Commission's policies that judge a broadcaster on the basis of whether its applicant pools and hiring reflect the community fail to account for the cultural uniqueness of certain minority groups.

6. Finally, the area's geography must be considered. In South Dakota, the majority of Native Americans live outside of the major cities. For example, while Native Americans represent 7.3% of the population state-wide, in the largest city, Sioux Falls, they represent only 1.6% of the population.^{6/} The largest concentration of "urban" Native Americans in South Dakota is in the Rapid City MSA where they constitute approximately 5% of the population, however, even here, the bulk of the Native American population resides on the Reservation 100 miles or more from the business center of the MSA.^{7/} Thus, the issue of their ability to commute to stations in the business centers is very real.

^{6/} Id.

^{7/} Id.

7. All of this is by way of example to illustrate the point that whatever cultural or geographic phenomena exist in a market are greatly exasperated in areas of low population density. While the SDBA does not mean to imply that its members cannot or do not employ Native Americans, the factors cited obviously impact their ability to attract Native American applicants to each job opening. The current EEO rules, policies and the proposed forfeiture guidelines, however, do not provide for these unique circumstances. The potential for an inequitable result in such a case, despite the broadcaster's obvious good faith outreach effort, demonstrates that EEO policies adopted for stations located in markets with large populations consisting of several substantial minority populations can fail to achieve the desired result in other markets, through no fault of the licensee.

8. In addition, as the Commission itself has noted, as small market stations, many SDBA stations have small staffs in comparison to the staffs of stations located in other markets. As a result, there are fewer employees to share the burden of required EEO record keeping as well as fewer employees to cover the duties normally assigned to the vacant post while recruitment proceeds. Carrying this burden can intensify ill-will in the work place already associated with EEO regulation. EEO requirements are already perceived by many as unfair to almost everyone involved in the hiring process. It is seen as unfair to employers who cannot fill job positions until a potentially non-existent applicant turns up, to other applicants who cannot know their fate until the required minority application is received and to minority hirees who will be assumed to be unqualified and hired not for their abilities but to better the organization's EEO statistics. While the Commission states that it "does not require that the proportion of minorities or women employed equal their presence in the labor force or even that any certain percentage of an entity's staff be composed of minorities or women," the

Commission' evaluation of a station's performance based on the number of minority and female referrals received and the number of overall and upper-level hires heightens the paranoia over the issue. In light of this climate, the FCC must adopt regulations which do not impose such burdens on stations' staffs. Requiring understaffed stations to carry on with vacancies on the staff while qualified applicants sit idly waiting for the required number of minority applicants, which given the small population size in South Dakota is rarely more than one, to come forward, will only lead to a worsening of these perceptions.

9. Moreover, the EEO outreach requirements impact smaller market stations more severely. As noted above, these stations do not have the sheer numbers of recruitment sources available to them to attract qualified applicants. If the available sources prove unproductive, these stations have nowhere else to turn. In addition, the current EEO requirements have created such a demand for highly trained and experienced minorities to fill high-level positions that, when attempting to fill positions requiring significant amounts of experience or to retain employees in those positions, smaller market stations may have to compete with larger market stations that are able to pay better wages or offer the candidate better exposure and career advancement. This phenomenon tends to deplete smaller markets of such highly qualified minorities. The need for high-level employees to have such training and experience should not, as Commissioner Barrett's comments in this proceeding indicate, be considered any less important simply because the position to be filled is in a small market. While smaller market stations frequently provide on-the-job training for entry-level positions, they, just like larger market stations, have legitimate experience standards for applicants seeking higher level positions. Where these stations are unable to compete with larger market stations' salaries and opportunities, they may be unable to fill those positions with a minority employee.

Proposals

10. In light of the practical problems that have arisen in the implementation of the Commission's current policies on EEO, the SDBA makes the following suggestions for streamlining the Commission's EEO rule and policies

11. Where a broadcaster's EEO program cannot be evaluated by use of a benchmark, the Commission must give the broadcaster the discretion to fashion its own EEO program based on the circumstances of its own community. The station's recruitment and hiring performance should not be based merely on the number of minorities in the station's MSA or county. A review of the station's program and results should consider the geographic size of the station's coverage, the proximity of the area's minorities to the station, the number of employees the station has, the size of its market and the specific minority involved, all in addition to and on an equal basis with, the size of its minority population. To truly effectuate this proposal, the Commission must modify the burden of proof put on petitioners to deny and modify its own processing guideline so that it is no longer sufficient simply to show that the station's employment profile does not mirror that of its MSA or county for the FCC to issue a letter of inquiry. To establish a case of discrimination, the petitioner should have allegations specific to one or more applicants or employees. The FCC's focus should then be limited to the individual case(s) raised. To establish a case of inadequate affirmative action, the petitioner should have to show that the broadcaster's actions were not a reasonable exercise of the discretion granted it by the Commission. The petitioner could show that the broadcaster did not use the referral sources it claimed to have used or did not receive the referrals from those sources it claimed to have received. In such a case, the broadcaster whose EEO program on its face appears to be a good faith effort at reasonable outreach, should be presumed to be in compliance and the burden of

proof be placed on the petitioner to establish that it is not.

12. In connection with this shift in focus, the Commission also should not assume that all recruitment efforts will achieve results. Where a licensee has utilized all available referral sources for a particular group, its efforts should not be dismissed as non-compliance or as being an inadequate program merely because minority applicants have not come forward. As demonstrated above, there may be legitimate geographic or cultural reasons for the lack of response. The FCC must place responsibility for seeking employment on the applicant. The Commission's proposed forfeiture guidelines which assess a fine for failure to recruit so as to attract minorities must either not be adopted or must be modified to punish only those broadcasters who have not established a program reasonably designed to attract minorities. If adopted in any form, it should be interpreted so that a program which on its face is logically designed to result in minority referrals is presumed adequate even if minority applicants did not respond to it.

13. To reduce the paperwork burden on licensees, the Commission should give broadcasters credit for using centralized sources such as state broadcasters associations. In doing so, however, the Commission should bear in mind that associations in states with smaller markets will have fewer resources to expend on the program and fewer organizations available to contact for referrals.

14. Taken together, these proposals seek to eliminate the contradictory nature of the Commission's rules and policies in this area which, while disclaiming any intent to impose a quota system, require broadcasters to interview and employ designated numbers of women and minorities in order to avoid a regulatory review which is not designed to account for specific circumstances such as those described above. If the FCC is unable to implement such a program,

it should consider deferring review of broadcasters' EEO programs to the EEOC.

Respectfully submitted,

SOUTH DAKOTA BROADCASTERS ASSOCIATION

By: William Holst
Its: Chairman of the Board

Dated: July 11, 1996